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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

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PAWTUXET COVE MARINA, INC., *et al.*,

Petitioners,

v.

CIBA-GEIGY CORPORATION, INC.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Did court below err in holding that citizens suits may be brought under the Clean Water Act only if the plaintiff alleges a continuing likelihood of future violations of the act, contrary to the holdings of other circuit courts? *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (C.A. 5, 1985), *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 791 F.2d 304 (C.A. 4, 1986), certiorari granted — U.S. —, 93 L.Ed.2d 827, 107 S.Ct. 872.

2. Did the court below base its decision on errors of fact?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the plaintiffs in the original action, and appellants in the court of appeals were Russell R. Hunt, Jr., and Beverley G. Hunt.

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No. .....

In The

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PAWTUXET COVE MARINA, INC., *et al.*,

Petitioners,

v.

CIBA-GEIGY CORPORATION, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Pawtuxet Cove Marina, Inc., *et al.*, petition for a writ of certiorari to review the judgement of the court of appeals for the first circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is published at 807 F.2d 1089 (C.A.1, December 18, 1986). The various decisions of the district court referred to herein are unpublished. For the convenience of the Court, petitioners refer to the Appendices I herein.

JURISDICTION

The judgement of the court of appeals was entered on December 18, 1986. This Petition is filed in reliance on Rule 20.2 of the Rules of the Supreme Court and under 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), provides as follows (emphasis added):

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1.) *Against any person* (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) *who is alleged to be in violation of (A) an effluent standard or limitation under this chapter* or (B)

an order issued by the Administrator or a State with respect to such a standard or limitation, or,

(2.) Against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order or to order the Administrator to perform such an act or duty, as the case may be, and *to apply any appropriate civil penalties under section 1319(d) of this title.*

STATEMENT OF THE CASE

The Pawtuxet Cove Marina, Inc., a Rhode Island corporation, owned and operated a marina on the Pawtuxet Cove in Cranston, Rhode Island. Russell R. Hunt, Jr., and Beverley G. Hunt owned a private residence on the cove and managed the marina.

The Ciba-Geigy Corporation is a New York corporation doing business in Rhode Island. It owns and operated a chemical processing plant less than two miles upstream from the petitioners' properties. The chemical company manufactures and processes plastic additives, photographic materials and pharmaceuticals at this plant. The Ciba-Geigy Corporation was granted a series of water discharge permits by the United States Environmental Protection Agency and the Rhode Island Department of Environmental Management. On August 1, 1983 the chemical company "tied-in" most of its discharges into the sewerage treat-

ment system of the City of Cranston. Its direct discharges were then limited to cooling water only. The chemical company violated its permits by emitting pollutants on several occasions. These emissions into the river included one with 50,000 gallons of wastewater containing excessive toluene, other known pollutants, and unknown matter on September 7, 1983.

Petitioners allege that as a result of the chemical company's water pollution violations and the resultant chemical flow into the river and river sediment, the proposals to dredge the Pawtuxet Cove were delayed and rejected. Neighbors in the area feared that the discharged pollutants in the sediment made the dredged material a hazard to health and safety. They lobbied against the proposals, to prevent the United States Army Corps of Engineers from obtaining funding for the project. To date, the Pawtuxet Cove has not been dredged and the chemical company's waste, discharged in violation of their permits, now lie on the shoreline and in the basin of the cove.

As a result of this contamination and the decision not to dredge the cove, the marina lost profits, the value of all petitioners' properties decreased and the petitioners suffered other harm.

Statutory notice of intent to file a citizens suit was served upon the chemical company on July 1, 1983 pursuant to 33 U.S.C. § 1365. Petitioners filed a civil complaint in the United States District Court for the District of Rhode Island on November 16, 1983.[1] The complaint

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[1]Jurisdiction of the district court was based on federal question 28 U.S.C. § 1331, diversity of citizenship 28 U.S.C. § 1332, and Clean Water Act jurisdiction 33 U.S.C. § 1365(a).

requested civil penalties and other relief in accord with 33 U.S.C. § 1365. The complaint also requested compensatory and punitive damages under state common law theories.

On February 13, 1984 the chemical company moved to dismiss the complaint alleging that the district court did not have jurisdiction. In a memorandum dated May 17, 1984 District Court Judge Bruce M. Selya granted the motion to dismiss in part, holding that a continuing violation was a prerequisite to a claim under the citizens suit provision under the Clean Water Act, 33 U.S.C. § 1365(a). On January 24, 1985 the petitioners moved to reconsider this holding, citing decisions of other district courts which found to the contrary. Judge Selya denied this motion based on *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir., 1985).

The chemical company moved for summary judgement on April 12, 1985 on the remaining state common law counts. It attached an unsworn Statement of Material Facts. Plaintiffs objected to the motion, and submitted an alternative statement of facts which the plaintiffs contended were disputed and should be litigated. Before the district court decision, the plaintiffs submitted an additional memorandum to the court with exhibits proving that material facts were indeed disputed and should be litigated. On September 19, 1985 District Court Judge Selya granted summary judgement in part, refusing to allow the plantiffs to raise "lack-of-dredging" issues at trial.

The district court judge did not limit his "lack-of-dredging" analysis to any of the particular state common

law counts in the summary judgement decisions. At trial, however, he foreclosed the introduction of any evidence which linked the lack-of-dredging to petitioners' damages. Petitioners were allowed to amend their complaint to indicate that they were only attempting to prove lack-of-dredging damages. The district court then extended its summary judgement to all common law counts and entered final judgement for the chemical company. The case was never submitted to a jury.

Prior to the trial petitioners had moved to amend the complaint by restoring the Clean Water Act count, alleging that the chemical company continued to violate its permits even during litigation. They also moved for a partial summary judgement on this Clean Water Act count, submitting a Statement of Material Facts which indicated that the violations were ongoing. The chemical company objected to the motion, but never disputed the Statement of Facts. Judge Selya denied the motions to amend for partial summary judgement on September 19, 1985 never reaching the merits of those two motions.

Petitioners appealed the district court decisions of dismissal and summary judgement. Eight days after petitioners' circuit brief was filed, the Court of Appeals for the Fourth Circuit decided *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.* (1986), 791 F.2d 304 (C.A. 4, 1986), certiorari granted, — U.S. —, 93 L.Ed. 2d 827, 107 S.Ct. 872, which allowed private parties to seek civil penalties for past violations of the act even if violations are no longer ongoing. This case was directly contrary to the decision of *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (C.A. 5, 1985). At oral argument before the first circuit, the petitioners argued that

Gwaltney more closely followed the language and intent of the Clean Water Act (33 U.S.C. § 1365). Petitioners' circuit court appeal was denied with the court holding that petitioners needed to show a likelihood of continuing violations. 807 F.2d at 1094.

ARGUMENT

A. The federal circuit courts of appeals are in conflict on their interpretation of the Clean Water Act.

This court granted certiorari to review the decision of *Gwaltney* on January 12, 1987. It is currently under review as case no. 86-473.

The case at bar involves the identical issue: the interpretation of the citizens suit provision of the Clean Water Act, 33 U.S.C. § 1365(a). The First Circuit Court of Appeals disputed the decisions of both *Hamker* and *Gwaltney* in its opinion.

This court granted certiorari to hear *Gwaltney,* and because this case involves the identical issue, petitioners pray that certiorari be granted in the present case.

B. The decision of the circuit court was based on incorrect assumptions of fact.

1. The motion to dismiss. The circuit court ignored the fact that there were ongoing violations which occurred even after the petitioners had filed the requisite statutory notice to commence this litigation.[2]

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[2]These violations occurred after the tie-in to the municipal sewerage treatment plant, which the first circuit believed to be a significant date.

The Clean Water Act count was dismissed pursuant to a motion to dismiss. In a motion to dismiss, under Fed. R. Civ. P. 12(b)(6) the motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 45, 2 L.Ed.2d 80, 84, 78 S.Ct. 99, 102 (1957). Therefore, all facts are to be viewed in a light most favorable to the non-moving party. *Acton Repair, Inc. v. American Broadcasting Companies,* 776 F.2d 143 (C.A.7, 1985), *Roth Steel Products v. Sharon Steel Corp.,* 705 F.2d 134 (C.A.6, 1983), *Williams v. Gorton,* 529 F.2d 668, affirmed 566 F.2d 1186 (C.A.9, 1976).

In the case at bar, the district court and the court of appeals should have presumed that the chemical company would continue to pollute, that its violations were ongoing, and that the petitioners would be able to show a likelihood of continuing violations. If they viewed the motion to dismiss with all facts taken in the light most favorable to the non-moving party, the courts below should have assumed future violations (which in fact, did occur). Not doing so, both courts should have allowed petitioners leave to amend the complaint so as to allow them to conform to the court's new interpretations of the statute.

2. The chemical company's summary judgement motion. The First Circuit based its decision on an incorrect supposition of facts in reviewing the summary judgement decision. The First Circuit stated:

> The principal impediment to maintenance dredging was the cost; everyone being in favor of the project, provided someone else paid. Appendix I, p. 3, 807 F.2d at 1091.

In reality, cost was no problem, as the United States Army Corps of Engineers would pay all costs for dredging the navigable waters of the cove. The only impediment was locating an acceptable dumping site for the contaminated dredging spoils. Offshore dumping was banned by the Governor of Rhode Island. Therefore, the proposals for the Pawtuxet Cove dredging suggested that the contaminated spoils be used to establish a marshland in the vicinity of the cove. Fearing their health and safety, the neighbors objected to these proposals, and no dredging plan was ever approved.

Petitioners appealed the summary judgement decision on the basis that the chemical company did not establish (or even allege) the necessary facts. Material facts remained in dispute. The district court simply assumed that some facts had been established by the chemical company and were not in issue. It appears that the circuit court has done worse: It relied upon facts which simply were not true.

Petitioners pray that they be allowed to have their case decided on an accurate finding of the facts.

———o———

CONCLUSION

Petitioners request that this Petition be granted.

Respectfully submitted,

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March, 1987

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1227

PAWTUXET COVE MARINA, INC., ET AL.,

Plaintiffs, Appellants,

v.

CIBA-GEIGY CORPORATION,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

[Hon. Bruce M. Selya, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Aldrich and Coffin, *Circuit Judges*.

Jeffrey A. Lanphear for appellants.

James Thornton on brief for Natural Resources Defense Council, Inc., amicus curiae.

Karen H. Edgecombe, Bruce J. Terris and *Terris, Edgecombe, Hecker & Wayne* on brief for Friends of the Earth, Sierra Club, Student Public Interest Research Group of New Jersey and Atlantic States Legal Foundation, amici curiae.

Katherine L. Rhyne, with whom *Douglas E. Kliever, John M. Bredehoft, Cleary, Gottlieb, Steen & Hamilton, Michael P. DeFanti* and *Hinckley, Allen, Tobin & Silverstein* were on brief for appellee.

December 18, 1986

ALDRICH, *Senior Circuit Judge*. In 1979 plaintiff Pawtuxet Cove Marina, Inc. purchased a marina on a

cove by the mouth of the Pawtuxet River in Rhode Island. Plaintiffs Russell and Beverly Hunt, owners of a residence on the cove, as well as officers and shareholders in Marina, Inc., purchased a second marina on the cove and leased it to Marina, Inc. In November 1983 plaintiffs sued defendant Ciba-Geigy Corp., in part for civil penalties under section 505 of the Clean Water Act, 33 U.S.C. § 1365, and in part for damages due to violations of Rhode Island common law. Defendant was located up river. From the penalty standpoint it, allegedly, had violated its permit under the National Pollutant Discharge Elimination System by discharging effluents containing excessive pollutants. From the damage standpoint the presence of these pollutants had, allegedly, prevented dredging to improve access to plaintiffs' properties, causing economic loss and, in turn, stress-produced illnesses. On defendant's motion for summary judgment the court dismissed the penalty action for lack of jurisdiction. Diversity jurisdiction existed for the damage claims. However, upon plaintiffs' stipulating during trial that these, unless for nominal damages, which they waived, depended upon proof that the dredging would have occurred but for defendant's polluting, the court ruled that plaintiffs had not made out a case. Plaintiffs appeal. We affirm.

The Pawtuxet River area silts up. In the early 1960's an agreement was entered into whereby the Army Corps of Engineers, funded by federal, state, and municipal contributions, dredged it to a depth of six feet at mean low water. A breakwater was built for protection, which, unfortunately, increased siltation, and it was recognized that substantial periodic dredging would be required for maintenance. This expectation proved to be correct, but

further dredging, though long needed, has not taken place. Indeed, one of the municipalities did not even fulfill its original obligations.

The principal impediment to maintenance dredging was the cost; everyone being in favor of the project, provided someone else paid. While discussions still continue, no money has ever been appropriated, federal or otherwise, nor have plaintiffs shown any appreciable prospect thereof. The problem was aggravated by a Rhode Island regulation passed in the early 1970's forbidding dumping of dredged materials in offshore waters. Since then a lack of disposal space has precluded almost all Rhode Island dredging, even of needed terminal facilities, let alone of recreational areas. It is true that some neighbors of possible disposal sites have objected to defendant's pollutants, but we agree with the district court that as a matter of law on the overall record this was an insignificant, and in no sense a "but for" factor. *Brodeur v. Desrosiers,* 505 A.2d 418, 423 (R.I. 1986); *Salk v. Alpine Ski Shop, Inc.,* 115 R.I. 309, 312-13, 342 A.2d 622, 625 (1975). Twenty years of negative history, quite apart from defendant's pollutants, with no indication of any change, left plaintiffs with nothing but hope. This was clearly insufficient to make out a case against defendant.

In this circumstance we need not consider plaintiffs' other common law obstacle, that actions for negligence generally require proof of physical, as distinguished from mere economic, harm. *Cf. Barber Lines A/S v. M/V Donau Maru,* 764 F.2d 50 (1st Cir. 1985); *Louisiana ex rel. Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 3271. *But cf. Burgess v. M/V Tamano,* 370 F. Supp. 247 (D. Me. 1973), *aff'd without opinion,* 559

F.2d 1200 (1st Cir. 1977) (permitting fishermen to recover for pecuniary losses caused by oil spill).

We turn to the more open question, the district court's ruling that plaintiffs, as private citizens, could not maintain a Clean Water Act action simply to enforce penalties with respect to violations that had already ceased. Plaintiffs' complaint was, of necessity, limited to the past ("has discharged effluents"), because of the fact that, prior to its filing, defendant had completed a tie-in with a municipal treatment facility and had ceased operating under the permit. Plaintiffs, accordingly, did not and could not, at least prima facie, trace the statutory language, which is addressed to the present.

> Sec. 505(a). Except as provided in subsection (b) of this section, any citizen[1] may commence a civil action on his own behalf—
>
> > (1) against any person . . . *who is alleged to be in violation* of (A) an efficient standard or limitation under this Act . . . .
> >
> > The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appro-

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1. A citizen is defined in subsection (g) as a "person or persons having an interest which is or may be affected." Since we dismiss on other grounds, post, we need not decide whether plaintiffs succeed in showing such. See discussion in *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440 (D.Md. 1985).

> priate civil penalties under section 309(d) of this Act. (emphasis added)

While this failure might seem a short and conclusive answer, plaintiffs cite district court cases, culminating with the recent case of *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), holding that the court not only may assess penalties for past violations in a citizen's suit (which, in itself, we do not question), but may entertain a suit seeking only that relief. Plaintiffs also cite language by Senator Muskie, post, one of the proponents of the Act, purportedly indicating the same intent.

We find it apparent, not only from this, but from a study of the statute as a whole, that its draftsmanship leaves something to be desired, in part, perhaps, because of the scope of the problems. We affirm the district court, but we think the proper interpretation of the statute lies somewhere between an absolute, literal, application of its language and the unlimited meaning adopted by the Fourth Circuit.

The *Gwaltney* court found the key statutory language —"is . . . in violation"—ambiguous, and hence encompassing all past, as well as present, violations. The court reasoned that one "continues to be 'in violation' by having 'violated.' . . . [T]he taint of a past violation is continuing." 791 F.2d at 309 (quoting *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1474, 1476 (D.N.J. 1985)). For this it analogized the case of a taxpayer who underpaid one year, but did not the next, pointing out that, until he paid, he continued to be "in violation." We find the argument forced, and the analogy

inapt. In the case of the taxpayer, the violation was the non-payment, and it, of course, continued until the obligation was met. A ceased improper discharge does not "continue." Moreover, the "violation" defined by the statute is not the non-payment of the penalty.

Nor does the statute speak in terms of "taint." This might be arguable if it had read "is a violator," but "is . . . in violation" speaks in terms of activity. The clear import of section 505(a) is that citizens are empowered to seek injunctive relief against a polluter that "is in violation" of the Act, and that in connection with such an action the district court is authorized to award "any appropriate" civil penalties. With great respect to the Fourth Circuit, we find its conclusion of ambiguity unpersuasive, particularly when it would have been so easy for Congress to have said "has violated," instead of "is . . . in violation" if the former was its intention, and with the difference being so conspicuous.

We note, too, that "effluent standard or limitations," ante, is defined in section 505(f)(6) as a "permit or condition thereof issued under section 402 of this Act, which *is* in effect under this Act . . ." (emphasis added), a clear use of the present. It is true that under section 505(f)(1's) definition of "effluent standard or limitation" the incorporation of other sections by reference produces grammatical confusion, but, in sum, in speaking of any "discharge" not otherwise excepted, there is no retreat from the present tense.

This use does not seem inconsistent, historically, with the enforcement emphasis of the anti-pollution acts. The Clean Air Act, from which the Clean Water Act took the

phrase "is . . . in violation," *see* 42 U.S.C. § 7604(a), provided for injunctive relief only. Alertness of concerned citizens, *see* § 505(g), n.1, ante, was of moment, but of secondary importance; even when, in enacting the Clean Water Act, Congress added penalties, such were to go to the government. There was no change in purpose. Rather, House and Senate Reports on the Clean Water Act characterize the addition of civil penalties as simply a modification of the citizen's action for injunction authorized under the Clean Air Act.[2] Thus we cannot share the *Gwaltney* court's reliance upon the fact that if the words "is . . . in violation" require a showing of a violation at the time of suit, many past violations would be immune to citizens' suits. Some immunity was an originally contemplated circumstance; the court uncovered no unique lacunae. No amount of discovering ambiguity in the quoted words can escape the fact that, with respect to alleged violations of permits, § 505(f)(6), ante, no action

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2. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News 3668, 3745:

> The Committee has established a provision in the bill that would provide citizen participation . . . modeled on the provision enacted in the Clean Air Amendments of 1970. As in that Act the provision in this bill is carefully restricted to actions where violations of standards and regulations or a failure on the part of officials to act are alleged. One modification would allow the Courts to impose civil penalties provided as a result of actions brought by citizens.

See also H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972) ("Section 505 closely follows the concepts utilized in . . . the Clean Air Act. However, this legislation authorizes the courts to impose civil penalties, as well as injunctive relief."). Further support for this view may be found in congressional references to citizen suit provisions as a means of "abating" ongoing violations of the Act. *See*, e.g., S. Rep. No. 414 at 79-82, *reprinted in* 1972 U.S. Code Cong. & Admin. News at 3745-47.

can lie for past violations unless the "permit . . . is in effect." This consistently corresponds with the reference to violations in the present tense; past permit violations are relevant to the extent that they cast light on the propriety of an injunction, no longer appropriate if there is no longer a permit.[3]

There is, however, a more serious problem if the concept of a present violation requires proof of its occurring at the instant of suit. A violation may last only ten minutes. Moreover, section 505(b)(1)(a) requires a sixty-day notice before suit is brought, so that even a persistent violator may, temporarily, "clean up his act." We therefore think that the words "is . . . in violation" should be sufficiently liberally construed to comport with the injunctive purpose of the Act—conduct indicative of continuing or renewed violations justifying an injunction, as

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3. Plaintiffs and amici rely on the remarks of Senator Muskie, one of the Act's principal sponsors. Senator Muskie stated, in part, that "[c]itizen suits can be brought to enforce against both continuous and intermittent violations" and that

> [the] 60-day provision was not intended . . . to cut off the right of action a citizen may have to violations that took place 60 days earlier but which may not have been continuous. As in the original Senate bill, a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one.

118 Cong. Rec. 33693, 33700 (1972). With due respect to Senator Muskie, we do not think an ambiguity is to be created out of whole cloth by his individual remarks. Moreover, the approach adopted in this opinion addresses what appears to be one of the Senator's principal apprehensions—that if only "continuous" violations are deemed to be covered under the Act, even persistent polluters may utilize the notice provisions to avoid liability.

distinglished from matters over and apparently done with, that would not warrant one. We find this possible in the fact that the statutory phrase is not the three words we have heretofore considered, but is "is alleged to be in violation." It is far less of a stretch to interpret these words as applicable to a present continuing intent than to take the *Gwaltney* court's encompassing a single past act. We would give the full phrase the practical construction that is given to the $10,000 requirement for jurisdiction in a diversity case. There jurisdiction is not necessarily lost if, in the final analysis, a lesser sum is involved; a reasonably held allegation is sufficient. *See St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938). We think the analogy excellent, and that the same construction is warranted, not only from the statutory wording, but also from its functional purpose. If a defendant's history of past violations is such that it is reasonable to believe that misconduct will continue, not only is it reasonable to allege a continuing violation, but this is precisely the showing that would induce a court to issue an injunction. *See*, e.g., *SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980). Such a construction corresponds both with the statutory language and with the statutory purpose.[4]

We accordingly hold that an action under 33 U.S.C. § 1365 may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act. In review-

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4. The *Gwaltney* court recognized this possible construction, but, without comment, chose not to adopt it. *See* 791 F.2d at 308 n.9.

ing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations. *Cf. Bonastia,* 614 F.2d at 912. We thus agree with the result in *Hamker v. Diamond Shamrock Chemical Corp.,* 756 F.2d 392 (5th Cir. 1985), in which the court held the plaintiff's allegation of a single, past violation to be insufficient. We do not, however, agree with the reasoning which, apparently, led the Louisiana district court, following the *Hamker* decision, to dismiss a number of actions simply because no violations occurred on the dates the complaints were filed. *See Sierra Club v. Copolymer Rubber & Chemical Corp.,* 621 F.Supp. 1013, 1015 (M.D. La. 1985). A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.

In the case at bar, plaintiffs alleged violations of a permit that limited defendant's discharges of process wastewater. At the time plaintiffs brought suit, however, the defendant had ceased operating under this permit because of its completion of a tie-in arrangement with a municipal treatment facility. Under these circumstances, there was no reasonable likelihood that defendant's alleged infractions would continue, and the district court correctly determined that the action should be dismissed.

Finally, there was no abuse of the court's discretion in denying plaintiffs' August 1985 motion to amend their complaint (a second time) to add a Clean Water Act

claim after the court had ordered dismissal. The new incidents had been disclosed to plaintiffs long before they had filed their motion. Furthermore, they apparently concerned matters not even within the scope of section 505(a). Plaintiffs had been given much consideration, and the court was well warranted in not reopening the case.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAWTUXET COVE MARINA, INC.
et al.
v. C. A. No. 83-0740 S

CIBA-GEIGY CORPORATION

MEMORANDUM AND ORDER

BRUCE M. SELYA, United States District Judge.

This case was initially referred to a United States Magistrate for consideration pursuant to 28 U.S.C. § 636(b)(1)(B) in respect to Ciba-Geigy Corporation's alternative motion to dismiss the complaint or for a more definite statement. On April 30, 1984, the magistrate, in a detailed report and recommendation (Report), suggested that the motion to dismiss be granted, with limited leave to amend. The plaintiffs have interposed an objection to the Report. This court has considered the matter *de novo, see* Local Rule 32(c)(2), and has concluded, for the reasons outlined below, that the Report is worthy of acceptance, subject to modification as limned hereby.

The plaintiffs raise four points of contention vis-a-vis the Report. These relate solely to the magistrate's ruling anent Section V of the complaint (the so-called "federal" statement of claim), and in no wise implicate those portions of the Report dealing with the several state law claims. Any and all other arguments previously made to the magistrate are deemed to be waived and need not be studied anew. *Id.* Thus, the court need not independently pass upon the Report insofar as it treats with the state law allegations (Report at 7-9), but will merely accept the

same without further ado. The court will, however, briefly address in combination the four grounds of objection (all of which have, as noted above, a common federal focus).

The magistrate concluded that, in the absence of any allegation that the defendant was currently engaged in ongoing violation(s) of effluent discharge standards or limitations, no private action would lie under the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1251 *et seq.*, and specifically, under 33 U.S.C. § 1365(a). Report at 4-5. He further held that there is no implied private right of action for damages within the interstices of the FWPCA, Report at 5; that civil penalties may only be assessed in accordance with 33 U.S.C. § 1319(d), and if so assessed, are payable to the government (not to private parties-plaintiff), Report at 5-6; and that no sufficient showing has been made out upon which general federal question jurisdiction, 28 U.S.C. § 1331, may be postulated. The aggregate effect of the plaintiffs' objection is to challenge each and all of these observations.

The magistrate cites respectable authority for his holdings; and, save only for an anfractuous reading of an isolated bit of legislative history, the plaintiffs' remonstrances do little to undermine this support. There is nothing in § 1365(a) which would confer jurisdiction upon a district court to enjoin, presumably as a matter of historical interest, FWPCA effluent discharge violations previously abated and no longer onging. Thus, the magistrate's insistence upon a continuing violation as a prerequisite to the grant of a § 1365(a) restraining order appears inexpugnable. As this court has remarked in another context:

> When all is said and done, "the sole function of an action for injunction is to forestall future violations, not to exact retribution for past wrongs."

Home Placement Service, Inc. v. Providence Journal Co., 573 F.Supp. 1423, 1428 (D.R.I. 1983), quoting *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

The recent First Circuit decision in *Conner v. Aerovox, Inc.*, No. 83-1169 (1st Cir. March 28, 1984), plainly indicates that, in this circuit, implied rights of action will not be read blithely into the FWPCA, *e.g., id.*, slip op. at 8; and further, *Conner, e.g., id.* at 8-9, adopts an interpretation of the landmark case of *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) which runs diametrically opposite to what the plaintiffs[1] would have this court read into that opinion. There is no cause of action such as the plaintiffs envision arising by statutory implication. And, a fair reading of the statutes, of *Sea Clammers*, and of the circuit court decisions in *Conner, Illinois v. Outboard Marine Corp.*, 680 F.2d 473 (7th Cir. 1982), *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981) and *Matter of Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981) leaves little room to doubt the efficacy of FWPCA preemption as to claims sounding in any theory of "federal common law."[2] Thus, except as they may be brought in accordance with authorization expressly conferred by FWPCA, plaintiffs' federally-grounded claims are baseless.

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[1]Plaintiffs' Memorandum In Support Of Objection (Memorandum), at 3.

[2]*See also Milwaukee v. Illinois*, 451 U.S. 304 (1981).

The magistrate, then, was correct in concluding that the only federally-grounded remedies available to these plaintiffs are as set out in 33 U.S.C. § 1365. That statute, in turn, provides not for monetary damages,[3] but for (i) enforcement of effluent standards and limitations and (ii) civil penalties. It cannot seriously be questioned that the latter remedy, although permissible ancillary to a citizen suit, refers to penalties which, if levied, are to be payable *to the government.* This is apparent both from the language and context of the Act, *see* 33 U.S.C. § 1319(d), and from the legislative history. *E.g.,* H.R. Rep. 92-911, 92d Cong., 2d Sess. 133 (1972). So, unless the magistrate erred in his view of the enforcement aspect of plaintiff's federal statement of claim, the Report should be accepted as authored.

This court, *see* text *ante* at 2-3, agrees with the magistrate's conclusion, Report at 5, that FWPCA's citizen suit provision only reaches ongoing—not past—violations of effluent discharge standards. Yet, on a motion to dismiss, the burden is on the movant to establish that the plaintiffs can prove no set of facts which would entitle them to maintain their theory of relief. *Harper v. Cserr,* 544 F.2d 1121 (1st Cir. 1976). The plaintiffs' version of the facts, as pleaded, must be taken as gospel. *Seveney v. United States Dept. of the Navy,* 550 F.Supp. 653 (D.R.I. 1982). And, although the plaintiffs' allegations are incon-

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[3]Insofar as the plaintiffs' claim of entitlement to money damages in a private action under the FWPCA rests on legislative history, *e.g.,* Memorandum at 3, it is unpersuasive. In point of fact, the Supreme Court has found that the legislative history of FWPCA points in a very different direction from that shown by the plaintiffs' compass. *Sea Clammers,* 453 U.S. at 17.

sistent and confusing at best, they do allege (Complaint, ¶ 12) that "the defendant . . . *is* discharging effluents into the Pawtuxet River." (Emphasis added). This asseveration has not been abandoned; the plaintiffs argue here, Memorandum at 3, that the violations are ongoing. While the court may, given an overview of the facts, be skeptical (as was the magistrate, Report at 5) as to whether a continuing discharge violation can be proven, the plaintiffs should not be cut off at this particular pass without a fair opportunity to document their claim. Similarly, the practical aspects of the situation elucidated by the magistrate (Report, n.1 and n.2), while potent evidence as to the facts, cannot control for Fed. R. Civ. P. 12(b)(6) purposes. As this court has lately observed in an analogous context: "After all, doubt, no matter how wellfounded or how deeply rooted, does not, in the absence of omniscience, rise to the level of certainty." *Linder v. Berge,* 577 F.Supp. 279, 282 (D.R.I. 1983). The magistrate was technically correct in pointing out that the complaint, as framed, lacks a precise averment that the "defendant is presently in violation of any effluent standard or limitation." Report at 5. But, this omission could well have been inadvertent *if* one credits the language of paragraph 12 of the complaint.

The complaint, in respect to the federal statement of claim, likewise fails to allege compliance with the statutory notice provisions, 33 U.S.C. § 1365(b)(1). This, too, is a fatal flaw, *Biederman v. Scharbath,* 483 F.Supp. 809 (E.D. Wis. 1980), but one which the plaintiffs say can be recti-

fied.[4] The interests of justice require, in these circumstances, that some leeway be given in permitting amendments.

Because of the inconsistencies and imprecisions which plague the federal statement of claim as it now stands, the defendant's motion is well taken. This statement of claim must be repleaded, consonant with the teachings hereof and devoid of the thrust for compensatory and-or punitive damages under any federally-grounded theory. It is assumed, of course, that any repleading of the federal statement of claim will, if facts are pleaded sufficient to make out a FWPCA claim, comply fully with the mandate of Fed. R. Civ. P. 11.

The motion to dismiss is granted; without prejudice to the plaintiffs' right to file, within 20 days from the date hereof, an amended complaint (i) for FWPCA enforcement of ongoing effluent standard violations (and civil penalties ancillary thereto, payable to the United States) and (ii) for state law claims in conformity with the Report.

So ordered.

/s/ Bruce M. Selya
BRUCE M. SELYA
United States District Judge

May 17, 1984

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[4]The magistrate appropriately noted that the injunctive relief sought by the plaintiffs oversteps the bounds of FWPCA. Report at 6. In and of itself, this would not, however, appear to be grounds for dismissal (although good practice would favor tailoring the remedy sought to that available by law or in equity). The courts have become hardened to the ways of pleaders who pray for the sun, the moon and all the stars, knowing full well that they are at most entitled to one of the lesser constellations.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAWTUXET COVE MARINA, INC., et al

v. C.A. 83-0740(S)

CIBA-GEIGY CORPORATION

MEMORANDUM AND ORDER

BRUCE M. SELYA, District Judge.

Plaintiffs have moved to strike the defendant's notice of appeal from a magistrate's recommendation (Report) suggesting that plaintiffs' claim for civil FWPCA penalties, 33 U.S.C. § 1365, be reinstated.[1] (The claim was previously dismissed by this court in a Memorandum and Order dated May 17, 1984, 21 E.R.C. 1393, hereinafter "*Pawtuxet I*").

The docket reflects that the Report, though dated May 7, 1985, was not filed by Magistrate Hagopian until May 9. The appeal clock arguably began to tick at that juncture. The objector, however, had 10 days within which to file, but the 10 days in reality began to run only after the defendant was served with a copy of the Report. *See* Fed. R. Civ. P. 72(b). Since mail was employed, receipt could

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[1]The plaintiffs have taken no cross appeal from the concomitant recommendation, Report at 3-4, that Ciba-Geigy's alleged past (noncontinuing) violations of FWPCA effluent discharge standards do not give rise to any suit for injunctive relief under FWPCA.

have occurred no earlier than May 10. The 10-day period would, therefore, have expired on May 20 at the soonest.[2]

All of that, however, overlooks Fed. R. Civ. P. 6(e), which intones:

> (e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

Since service was effected by mail in this instance, and since the notice of appeal was filed on May 22 (which, by last reckoning, was within 3 days next following May 20), the motion to strike is without foundation. The court, therefore, need not comment on the additional fact that, at a May 14 chambers conference in this matter, opposing counsel (and the court) acquiesced in the suggestion that the protest of the Report would be filed within 10 days thereafter.

Accordingly, the court turns to the merits of the appeal. In so doing, the court again observes that, inasmuch as the motion for reconsideration can be seen as a "nondispositive" motion, Fed. R. Civ. P. 72(a), it is at least

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[2]It is possible that, despite the magistrate's entry of a recommendation instead of an order, the applicable standard should be that for nondispositive motions. Fed. R. Civ. P. 72(a). The period for filing would, if that were the case, be "10 days after the entry of the order". *Id.* Inasmuch as the order was *entered* on May 9, counting in such fashion brings one to May 19. But, the 1-day difference is immaterial; May 19 was a Sunday, so the period self-extended "until the end of the next day". Fed. R. Civ. P. 6(a). Thus, viewed from either perspective, May 20 was the appointed day.

conceivable that the defendant, disenchanted with the magistrate's view that the claim for civil penalties should be reinstated, might better have proceeded via an objection rather than an appeal. *Compare id. with* Fed. R. Civ. P. 72(b). The distinction could, of course, make a difference, as Rule 72(a) superimposes a "clearly erroneous" standard of review which is not applicable in the milder climes where Rule 72(b) holds sway.[3] The magistrate, however, has characterized the Report as a "recommendation" only, *e.g.*, Report at 1, 3, and has alluded specifically to 28 U.S.C. § 636(b)(1)(B) (the statutory font of Rule 72(b)). Under such circumstances, the court should defer to the author's characterization of his own work product, *see Advance Financial Corp. v. Isla Rica Sales, Inc.*, 747 F. 2d 21, 26 & n. 10 (1984), and treat the defendant's supplication as a Rule 72(b) appeal.

The merits of the appeal need not long detain this court. It was plainly forecase in *Paxtuxet I* that § 1365 "only reaches ongoing—not post—violations of effluent discharge standards". Though the magistrate has now suggested to the contrary vis-a-vis civil penalties, he did not have before him the very recent decision of the Fifth Circuit in *Hamker v. Diamond Shamrock Chemical Co.*, 756 F. 2d 392 (5th Cir. 1985). *Hamker* flatly held that FWPCA "does not authorize citizen suits seeking . . . imposition of civil penalties where the defendant is not al-

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[3]The difference is, in this case, more apparent than real. No matter which standard of review applied, this court's decision would in this instance be unaffected. *See* text *post*. In any event, the denomination of the document is not controlling, so long as it is timely filed and clearly apprises the court of the opponent's position. *See Cockayne v. Heckler*, C.A. No. 84-0096-S, slip op. at 1 n. 1 (D.R.I. May 23, 1985).

leged to be in [present] violation of an effluent standard, limitation, or order". *Id.* at 396. Consequently, civil penalties are appropriate "only as prospective relief". *Id.* at 398.

Hamker is good law; and, it is on all fours with this case (in which the plaintiffs do *not* allege any ongoing violation). If the magistrate had been afforded the benefit of *Hamker,* the court does not doubt that his ultimate recommendation would have tracked its teachings. In any event, *Hamker* controls the instant appeal and completely undermines the plaintiff's motion.

The motion to strike is denied.

The defendant's appeal is sustained. The Report is accepted and approved only insofar as it suggests that the court eschew reconsideration of the claim for injunctive redress. *See* n. 1 *ante.* The recommendation favoring reinstatement of the plaintiffs' claim for civil penalties is rejected. The motion for reconsideration is, therefore, denied in its totality.

So ordered.

ENTER:

/s/ BRUCE M. SELYA
UNITED STATES DISTRICT JUDGE

JUNE 7, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Pawtuxet Cove Marina, Inc., *et al.*,

Plaintiffs,

v. C.A. No. 83-740-S

Ciba-Geigy Corporation,

Defendant.

MEMORANDUM DECISION

BRUCE M. SELYA, United States District Judge.

Beverly and Russell Hunt, former owners of the Pawtuxet Cove Marina, together with their captive corporation, Pawtuxet Cove Marine, Inc. (PCMI), filed this suit against the Ciba-Geigy Corporation (C/G), claiming that the chemical manufacturing company's discharge of effluents into the Pawtuxet River had damaged their property. The plaintiffs originally filed a claim pursuant to the citizen-suit provision of the Federal Water Pollution Control Act, (FWPCA), 33 U.S.C § 1365(a), alleging that C/G had violated permits issued under Section 1344 of that Act. In addition to their federal claims, the plaintiffs included several state common law counts sounding in negligence, nuisance, strict liability and trespass. This court has independent jurisdiction over the state law claims under 28 U.S.C. § 1332, inasmuch as the parties are of diverse citizenship and (so the plaintiffs allege) the requisite amount is in controversy.

In February 1984, the defendant moved to dismiss under Fed. R. Civ. P. 12(b)(6), focussing upon the plaintiffs' perceived failure to state a claim under the FWPCA. The key issue at that point was whether the FWPCA pro-

vided a right of action for *past* violations of effluent standards. On April 30, 1984, the magistrate concluded that it did not, and recommended that the FWPCA claim be dismissed. The plaintiffs objected. This court affirmed the magistrate's recommendation, but allowed the plaintiffs leave to amend if ongoing effluent standard violations were in evidence. The amended complaint did not cure the malaise; the magistrate again recommended dismissal of th FWPCA count; and, on September 10, 1984, this court adopted the recommendation. The plaintiffs, nothing daunted, moved on January 24, 1985 for reconsideration. The magistrate, facing the question for the third time, gave them half a loaf. But, on June 7, 1985, this court finally doused whatever embers of the FWPCA claim remained.

The federal statutory claim has thus been disposed of, thrice and for all. *But see* plaintiffs' newest motion to amend, discussed *infra* at 11. After discovery closed, C/G moved for summary judgment on the state law claims. Fed. R. Civ. P. 56. The motion was referred to the magistrate for consideration pursuant to 29 U.S.C. § 636(b)(1)(B); he issued his report (Report) on July 24, 1985, recommending that the motion be granted in part and denied in part. Inasmuch as both parties objected to those portions of the magistrate's report which were adverse to them, the Report has been challenged in its entirety. Those cross-objections are now before this court.

I.

The copious filings before the court indicate plainly the basic factual scenario. Mr. and Mrs. Hunt own a residence which fronts on Pawtuxet Cove in Cranston, Rhode

Island. PCMI, a Rhode Island corporation formed in 1979 and dissolved in December 1984, previously owned a marina business and real property on Paxtuxet Cove. Russell Hunt owned a 30% equity interest in the corporation and a majority of the voting shares. In 1982, he acquired the Edgewood Marina, and rented its facilities to PCMI. The plaintiffs asserverate that C/G, which operated a chemical manufacturing plant situated upstream from the Cove, discharged effluents into the Pawtuxet River and damaged the plaintiffs' properties.

II.

Even in its latest incarnation, the complaint is no model of precision or clarity. It asserts, at most, only the bare essentials of the state law claims. To a large extent, the contours of the plaintiffs' case have been fleshed out in discovery, augmented by the briefs and arguments of counsel. When the defendant sought summary judgment, the plaintiffs' remaining contentions appeared to be as follows:

1) That the defendant's act of pollution frightened residents and local government bodies so that the Cove could not be dredged, causing the plaintiffs' business to suffer.

2) That the defendant's emissions trespassed on the plaintiffs' property.

3) That the defendant's discharge of toxic chemicals constituted a nuisance.

4) That the defendant engaged in ultra hazardous activity, rendering it strictly liable to the plaintiffs.

5) That the defendant's violation of its National Pollutant Discharge Elimination System (NPDES) permit evidenced negligence on its part.

The magistrate recommended that the defendant's motion for summary judgment be granted as to the first issue, but suggested denial of the motion as to the four remaining initiatives. Because the motion was referred to the magistrate pursuant to 28 U.S.C. § 636(b)(1)(B), this court is required to review the matter de novo, and is empowered to accept, reject, or modify, in whole or in part, the recommendations of the magistrate.

The summary judgment standard, which applies to the instant motion, is well elucidated in the Report, *e.g.*, Report at 2-3, and it would be pleonastic to repeat it anew.

III.

A. The gravamen of the plaintiffs' main claim (harm caused by interference with putative dredging) is that C/G was careless in discharging pollutants into the Cove, thus adversely affecting public opinion. In consequence of this negative ambience, the plaintiffs' thesis runs, public pressure mounted on the local political bodies, which thereby prevented the dredging of the Cove. And, the lack of dredging injured the plaintiffs' business economically. As the First Circuit has indicated, however, "controlling case law denies that a plaintiff can recover damages for negligently caused financial harm, even when foreseeable, except in special circumstances." *Barber Lines A/S v. M/V Donau Maru,* 764 F.2d 50, 51 (1st Cir. 1985). The lack of dredging does not meet the criterion of the special circumstances outlined by that court: "There is present here neither the most common such special circumstance—

physical injury to the plaintiffs or to their property—nor any other special feature that would permit recovery." *Id.*

Furthermore, it is not at all clear that the defendant's conduct—even if negligent—caused the plaintiffs' injuries. *See generally Salk v. Alpine Ski Shop, Inc.*, 115 R.I. 309, 342 A.2d 622 (1975). Though the defendant has served up a potpourri of materials demonstrating that the dredging of the Cove has long been hampered by a variety of political and regulatory obstacles, the plaintiffs have offered nothing but the merest of vellieties: they eschew any present tender of proof, but mouth empty assurances that they will (somehow) prove the "but for" connection at a trial. Such generalized assurances are manifestly insufficient to blunt the blade of a properly-honed Rule 56 axe. *See, e.g., Thyssen Plastik Anger KG v. Induplas, Inc.*, 576 F.2d 400 (1st Cir. 1978).

The voluminous record in this case is entirely barren of any evidence (or even the hint of any evidence) from which a rational factfinder could deduce that pollution emanating from C/G's factory proximately caused Pawtuxet Cove to remain undredged. Or, put another way, the plaintiffs have failed to offer a fact-based predicate, sufficient, even when examined in the light most favorable to the plaintiffs, to support the conclusion that the Cove would have been dredged but for C/G's shortcomings. In the absence of any genuine issue of material fact on the issue, the defendant is plainly entitled to *brevis* disposition as a matter of law. The magistrate's recommendation is accepted in this respect. Summary judgment on the issue shall enter in the defendant's favor.

B. The questions raised anent the remaining counts are much more problematic. The trespass issue is illus-

trative. As the magistrate correctly noted, the only land in which the plaintiffs have a possessory interest for the purpose of finding a trespass here would be that above the mean high-tide level. *See State v. Ibbison,* 448 A.2d 728 (R.I. 1982). The plaintiffs state that the defendant's discharge of chemicals did trespass on their land above the mean high-tide level by sending microscopic substances onto it. Though the caselaw elsewhere seems to be in some disarray, it cannot be gainsaid that the question of whether the entry of microscopic substances onto the land of another can constitute an actionable trespass has not yet been decided in Rhode Island.

The same sort of uncertainty pervades the strict liability count. Rejected in a real property context by the state supreme court a half-century ago, *see Rose v. Socony-Vacuum Corp.,* 54 R.I. 411, 173 A.627 (1934), the issue has recently been left entirely open. *See Wood v. Picillo,* 443 A.2d 1244 (R.I. 1982). And, the private nuisance inquiry[1] is necessarily fact-intensive; the "unreasonableness" of the resultant injury, inter alia, must be assayed. *Braun v. Iannotti,* 54 R.I. 469, 175 A. 656 (1934).

It appears likely that certification of some or all of the state law issues to the state supreme court may be desirable. If this is so, however, such certification would be most facilely accomplished on a full-blown trial record. And, judicial resources would ultimately be conserved

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[1]According to the Rhode Island Supreme Court, private nuisance is an "interference with the use and enjoyment of land", which "includes a material interference with the ordinary physical comfort or the reasonable use of one's property." *Wood, supra.*

thereby, for a trial would put the plaintiffs to their mettle: if, viewing all the evidence and the reasonable inferences therefrom in the light most flattering to the claimants and adopting the views of unsettled points of state law most hospitable to their cause, no case sufficient to reach the jury is presented, then this court will be spared the chore of vaticinating state law, and the certification engine need not be ignited.

This court, in confronting analogous situations, has not balked at spurning "hasty and reflexive conclusions" where the fact/law environment is "tenebrous". *Lawton v. Abbott Laboratories,* C. A. No. 80-0556-S, slip op. at 5 (D.R.I. Feb. 4, 1985). The precepts enunciated in *Lawton,* slip op. at 3-4, have substantial cogency in respect to the case at bar:

> It is settled beyond peradventure that summary judgment should be used sparingly in cases involving complicated issues of fact and law. *Kennedy v. Silas Mason Co.,* 334 U.S. 249, 256-57 (1948); *Anthony Grace & Sons, Inc. v. United States,* 170 Ct. Cl. 688, 345 F.2d 808, 810 (1965), *rev'd on other grounds,* 384 U.S. 424 (1966). *See generally* 6 Moore, *Federal Procedure,* § 56.15[6], at 2158-59 (2d ed. 1953). And, where the legal issues are of great significance, or particularly complex, or where the issues are such that logic dictates that they be resolved on a plenary factual record, disposition in advance of trial is often contraindicated. *Anthony Grace & Sons, Inc.* 345 F.2d at 810; *Pacific American Fisheries, Inc. v. Mullaney,* 191 F.2d 137, 141 (9th Cir. 1951). Evolutionary changes in the governing law, currently in progress, counsel especial hesitation. *Cf. Bento v. I.T.O. Corp. of Rhode Island,* C. A. No. 83-100-S, slip op. (D.R.I. Nov. 11, 1983) (Memorandum and Order Denying Motion to Dismiss). "The principles governing summary

judgment procedure should be applied in a common sense manner to the realities of the litigation at hand." *Williams v. Howard Johnson's Inc. of Washington,* 323 F.2d 102, 105 (4th Cir. 1963). As the Eighth Circuit has lately observed:

> "[A] district court in passing on a Rule 56 motion performs what amounts to what may be called a negative discretionary function. The court has no discretion to *grant* a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be *denied,* and the case fully developed."

McLain v. Meier, 612 F.2d 349, 356 (8th Cir. 1978) (emphasis original). *See also National Screen Service Corp. v. Poster Exchange, Inc.,* 305 F.2d 647, 651 (5th Cir. 1962). *See generally* 10 C. Wright & A. Miller, *Federal Practice & Procedure,* § 2728, at 552 *et seq.*

As was true in *Lawton,* slip op. at 3, "this is neither the typical issue nor the typical case." Whatever decision eventuates on the thorny state law questions which are raised can, from aught that appears at this juncture, best be made on a fully-developed factual record. Accordingly, the court will exercise the "negative" discretion of which *McLain,* 612 F.2d at 356, speaks, and will at this time withhold *brevis* disposition of the remaining issues postulated by C/G's Rule 56 motion. *Cf. Cortes Quinones v. Nettleship,* No. 84-2014, slip op. at 12 (1st Cir. Sept. 13, 1985) (per curiam) (summary judgment inappropriate where "plaintiffs have raised sufficient unanswered questions to require [the] case to go forward with more complete development of the facts"); *Earnhardt v. Puerto Rico,* 691 F.2d 69, 73 n.1 (1st Cir. 1982) (emphasizing im-

portance of exhuming facts when issues are novel, unsettled, and/or rooted in a changing area of the law).

C. For the reasons stated herein, the magistrate's Report is accepted and approved. The various objections thereto are overruled. Partial summary judgment is granted in the defendant's favor as to the lack-of-dredging issue. Summary redress is denied as to the remaining prongs of the Rule 56 motion, in each instance without prejudice to the renewal, when appropriate, of C/G's sundry theories.

IV.

The plaintiffs, during the currency of these proceedings, have filed three neoteric motions. None of them warrant extended comment. All pivot off an oil spill which supposedly occurred on March 7, 1984. The plaintiffs' motion for leave to conduct additional discovery anent same is well out of time: the spill was disclosed by C/G to the plaintiffs on March 4, 1985; discovery closure under the February 1984 pretrial order has occurred; no good cause has been shown for the delay in deciding to embark upon discovery; and, the isolated (rather minor) incident is, at best, tenuously related to the merits *sub judice*. Further discovery in this wise would paint the lily; it would be unduly burdensome and unnecessary. The motion is DENIED.

The plaintiffs' motion for partial summary judgment can best be described as captious. That motion is totally devoid of any trappings indicative of the absence of genuine issues of material fact and/or that the plaintiffs, on any one or more issues in the case, are entitled to judgment as a matter of law. A partial summary judgment such as

the plaintiffs seek would be wholly inappropriate.[2] That motion, too, is DENIED.

The plaintiffs' motion to file a further amended complaint is a closer call. Amendments are liberally to be granted, where the interests of justice require. Yet, this particular motion comes late in the day; it is predicated upon the "oil spill" information, *see supra,* long known to the movants; and it confuses casual spill incidents with ongoing effluent standard violations. These have much different legal ramifications. *Compare* 33 U.S.C. § 1321 *with id.,* § 1365(f). Moreover, the Rule 15 motion represents the fourth attempt by the plaintiffs to inject the (phantom) ongoing violation issue into the case. The line must be drawn somewhere. In a comparable context, this court previously observed:

> It is said that hope springs eternal; but litigation premised on hope alone need not last eternally.

Gleason v. Merchants Mutual Ins. Co., 589 F. Supp. 1474, 1479 (D.R.I. 1984).

As the proposed amendment comes too late and clearly bears the hallmark of yet another exercise in abject futility, the motion to amend is likewise DENIED.

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[2]Even if, as the plaintiffs argue, C/G has not timely objected to this motion, it cannot be granted unless their "moving papers were sufficient to entitle them to summary judgment." *Cortes Quinones,* slip op. at 2. And, their moving papers were hopelessly inadequate to pass this test.

V.

Counsel for the defendant shall prepare and present for entry a suitable form of order consonant with the foregoing.

Enter:

/s/ BRUCE M. SELYA
United States District Judge
September 19, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAWTUXET COVE MARINA, INC., *et al.*,

Plaintiffs,

v. Civil Action No. 83-0740

CIBA-GEIGY CORPORATION, Judge Selya

Defendant.

ORDER

This Court having considered the Motion of Defendant CIBA-GEIGY Corporation For Summary Judgment and the various supporting and opposing memoranda relating thereto, and in accordance with this Court's Memorandum Decision of September 19, 1985, it is hereby *ordered* that:

1. Defendant's Motion for summary judgment is GRANTED with respect to claims of any nature based on failure to dredge Pawtuxet Cove.

2. Defendant's Motion for summary judgment is DENIED, without prejudice to the renewal when appropriate of the underlying arguments, with respect to:

a) the claim based on the allegation that defendant's discharge on microscopic substances on to plaintiffs' property above the mean high-tide level constituted trespass;

b) the claim based upon the allegation that defendant's discharge of chemical process wastewater constituted a nuisance;

c) the claim based upon the allegation that defendant engaged in ultrahazardous activities; and

d) the claim for physical injury to plaintiffs or their property based upon the allegation that any violation by defendant of its National Pollutant Discharge Elimination System permit evidences negligence on its part.

In addition, after due consideration of the following motions and of the various supporting and opposing memoranda relating thereto, it is also hereby *ordered* that:

1. Plaintiffs' Motion For Leave to Conduct Further Discovery is DENIED.

2. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

3. Plaintiffs' Motion to Amend The Complaint is DENIED.

ENTERED:

/s/ Lorraine Kizior

BY ORDER:

/s/ Bruce M. Selya
United States District Judge

Dated: October 4, 1985

CERTIFICATE

I hereby certify that on this — day of ————, 1985, I have sent a copy of the within Order by United States first class mail, postage prepaid to:

Jeffrey A. Lanphear, Esq.
2139 Broad Street
Cranston, Rhode Island 02905

September —, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAWTUXET COVE MARINA, INC.,
et al

VS. C. A. NO. 83-0740-S

CIBA-GEIGY CORPORATION

ORDER

This matter came before the court on plaintiffs' oral motion to amend their complaint in the course of trial and to dismiss their trespass action, and after consideration and for the reasons stated ore tenus, it is hereby

ORDERED

1. The motion to amend the complaint to add paragraphs 33A, 46A, and 51A which identically state:

> The plaintiffs allege that these acts led to the frustration of any meaningful or timely attempt to dredge Pawtuxet Cove, and that this lack of dredging, in turn, was the sole, direct and proximate cause of each and all of the losses, damages, injuries and harm of which the plaintiffs' complain in this action.

is granted. The amended complaint shall be filed within three days.

2. The motion to dismiss the trespass claim is granted and said dismissal is with prejudice.

3. The defendant is granted summary judgment on all remaining claims in the amended complaint.

4. The clerk shall enter judgment for defendant on all claims including those disposed of by this and previous orders of the court.

ENTERED as an order of this court this — day of February, 1986.

BY ORDER:

_____

ENTER:

_____

CERTIFICATION

TO: Jeffrey A. Lanphear, Esq.
2139 Broad Street
Cranston, RI 02905

I hereby certify that I mailed a true copy of the within order to the attorney of record, as set forth above, on the 4th day of February, 1986.

/s/ Donna M. Hweige

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
DISTRICT RHODE ISLAND

CASE TITLE

PAWTUXET COVE MARINA, INC.

v.

CIBA-GEIGY CORPORATION

DOCKET NUMBER 83-0749-S

NAME OF JUDGE OR MAGISTRATE
BRUCE M. SELYA

[ ] *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] *Decision by Court.* This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment entered for the defendant.

/s/ Carmella Accioli
Deputy Clerk

Date Feb. 5, 1986

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1227.

PAWTUXET COVE MARINA, INC., ET AL.,

Plaintiffs, Appellants,

v.

CIBA-GEIGY CORPORATION,

Defendant, Appellee.

JUDGMENT

Entered: December 18, 1986

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/Francis F. Scigllano,
Clerk.

[cc: Messrs. Lanphear, Thornton and Ms. Edgecombe and Ms. Rhyne]

/s/ By Richard W. Gordon
Chief Deputy Clerk

Supreme Court, U.S.
FILED
APR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1562

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PAWTUXET COVE MARINA, INC., *et al.*,
Petitioners,

v.

CIBA-GEIGY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

RESPONDENT'S MEMORANDUM IN OPPOSITION

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April 20, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED *

1. Whether plaintiffs are entitled to relitigate in this Court their view of the factual circumstances of their purported tort claims and federal claim, where that view was repeatedly rejected by the courts below as wholly unsupported.

2. Whether a citizen suit under Section 505 of the Clean Water Act, 33 U.S.C. § 1365, will lie against a former industrial discharger where the former discharger is not and cannot be alleged to be "in violation" of an effluent standard or limitation contained in a permit that is "in effect" under the Clean Water Act.

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* These questions have been restated from those set out in the Petition.

PARTIES BELOW

Petitioners, who were plaintiffs in the District Court and appellants in the Court of Appeals, are Russell Hunt, Beverley Hunt, and Pawtuxet Cove Marina, Incorporated. Respondent, who was defendant in the District Court and appellee in the Court of Appeals, is CIBA-GEIGY Corporation.*

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* The following information is provided for purposes of Rule 28.1. The parent company of CIBA-GEIGY Corporation is CIBA-GEIGY International, Limited. CIBA-GEIGY Corporation's only subsidiary or affiliate (other than wholly-owned subsidiaries) is CIBA-Corning Diagnostics.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1562

PAWTUXET COVE MARINA, INC., *et al.*,
Petitioners,

v.

CIBA-GEIGY CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

RESPONDENT'S MEMORANDUM IN OPPOSITION

Respondent CIBA-GEIGY Corporation ("CIBA-GEIGY") opposes the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the First Circuit.

STATEMENT OF THE CASE

Petitioners Pawtuxet Cove Marina, Inc., a defunct Rhode Island corporation, and Beverley and Russell Hunt, two of its former shareholders ("plaintiffs"), were the owners and operators of commercial marina properties on Pawtuxet Cove in Cranston, Rhode Island. For approximately three decades prior to the commencement of

this action, respondent CIBA-GEIGY, a New York corporation, operated a specialty chemical manufacturing facility in Cranston, Rhode Island. The plant discharged treated process wastewater into the Pawtuxet River pursuant to National Pollutant Discharge Elimination System ("NPDES") permit No. RI-0001171.

CIBA-GEIGY's permit expired by its own terms in July of 1983, and by August 1, 1983, CIBA-GEIGY had "tied in" its pretreated wastewater discharges to the Cranston municipal wastewater treatment plant and completely ceased direct process wastewater discharges from the Cranston plant.[1] During the pendency of this litigation, manufacturing operations at the Cranston plant were discontinued.

Notwithstanding the cessation of process wastewater discharges several months earlier, plaintiffs brought this action in November 1983 in the United States District Court for the District of Rhode Island. Plaintiffs alleged that certain past discharges from CIBA-GEIGY's Cranston manufacturing facility upstream had affected Pawtuxet Cove, damaging plaintiffs' marina business and rendering CIBA-GEIGY liable to them pursuant to federal and Rhode Island common law under a variety of theories including trespass, nuisance, negligence, strict liability, and "*res ipsa loquitor.*" Plaintiffs also alleged that past discharges had violated CIBA-GEIGYs NPDES permit, and sought the imposition of civil penalties under Section 505 of the Clean Water Act (which penalties plaintiffs erroneously contended would be payable to themselves).

Plaintiffs' initial Complaint was dismissed by the District Court, District Judge (now Circuit Judge) Bruce

---

[1] The Cranston plant continued to discharge relatively small amounts of cooling water (tap water which did not come into contact with any process materials), which is not at issue in this action.

M. Selya presiding, on May 17, 1984, for failure to state a claim upon which relief may be granted. Leave was given to file an amended complaint for "enforcement of ongoing effluent standard violations (and civil penalties ancillary thereto, payable to the United States)" and for properly-pleaded state common law claims.[2] Plaintiffs filed an Amended Complaint in June 1984 but, because CIBA-GEIGY did not discharge process wastewater pursuant to an NPDES permit, plaintiffs remained unable to allege ongoing violations. On September 10, 1984, the District Court again dismissed the citizen suit count for failure to state a claim upon which relief may be granted, but approved the finding of a magistrate that the "bare essentials" of state common law claims had been alleged and permitted the action to go forward based on the diverse citizenship of the parties.[3]

Following extensive discovery, CIBA-GEIGY filed a motion for summary judgment as to the state common law claims, based on the absence of any issue of material

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[2] May 17, 1984 Memorandum and Order of the District Court, App. at 17. The District Court dismissed plaintiffs' claims under federal common law, a determination which the plaintiffs have not challenged.

[3] Plaintiffs moved for a reconsideration of the two dismissals of the citizen suit counts on January 24, 1985; the District Court denied that motion on June 7, 1985. App. at 18-21. Yet another motion to amend, this time with a complaint alleging unspecified ongoing violations based on two spill incidents, was filed in August of 1985. The District Court denied the motion to amend, on a variety of grounds. App. at 31. *See infra* at 7. Plaintiffs filed an objection to the ruling, which the District Court treated as another request for reconsideration of the citizen suit claim and denied on October 30, 1985. Plaintiffs then filed a premature appeal on the citizen suit issue to the United States Court of Appeals for the First Circuit, *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, No. 85-1940 (1st Cir. 1985), which was summarily dismissed by the Court of Appeals for want of jurisdiction on December 10, 1985, approximately two months before trial of the diversity claims commenced in the District Court.

fact respecting the role of CIBA-GEIGY's discharges in causing plaintiffs' injuries. As the District Court characterized it, the "gravamen of the plaintiffs' main claim" was that CIBA-GEIGY's discharges entered Pawtuxet Cove, thus adversely affecting public opinion regarding the disposal of dredging spoil from the Cove and thereby preventing dredging of the Cove.[4] The lack of dredging was asserted to have injured financially the plaintiffs' marina business, with attendant stress from the financial harm allegedly causing various physical ailments of the individual plaintiffs.

Judge Selya granted CIBA-GEIGY's motion in part, holding that "[t]he voluminous record in this case is entirely barren of any evidence (or even the hint of any evidence) from which a rational factfinder could deduce that pollution emanating from [CIBA-GEIGY's] factory proximately caused Pawtuxet Cove to remain undredged."[5] However, based on plaintiffs' assurances that the state common law claims had bases independent of the lack of dredging of the Cove, Judge Selya permitted plaintiffs to go to trial on the state law claims.

Trial began on February 3, 1986. After empanelment of a jury, a viewing of the marina and the CIBA-GEIGY plant site, and one and one-half days of testimony, plaintiffs admitted that all of the state common law claims were predicated on the failure to dredge Pawtuxet Cove, the issue which had been resolved in CIBA-GEIGY's favor on summary judgment. Plaintiffs submitted a Second Amended Complaint, specifying that all

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[4] September 19, 1985 Memorandum Decision of the District Court, App. at 25. The plaintiffs' Second Amended Complaint, which delimits the common law issues, alleged that the "lack of dredging . . . was the sole, direct and proximate cause of each and all of the losses, damages, injuries, and harm of which the plaintiffs complain in this action." App. at 35.

[5] September 19, 1985 Memorandum Decision of the District Court, App. at 26.

of the common law claims were based entirely on the dredging theory.[6] Judge Selya discharged the jury and entered complete summary judgment in favor of CIBA-GEIGY on the common law claims.

Plaintiffs appealed to the United States Court of Appeals for the First Circuit, contesting both the entry of summary judgment on the common law claims and the repeated dismissals of the citizen suit. The Court of Appeals, in an opinion delivered by Senior Circuit Judge Aldrich, agreed with the District Court that: (i) "as a matter of law on the overall record" CIBA-GEIGY's discharge "was an insignificant, and in no sense a 'but for' factor" in the failure to dredge Pawtuxet Cove, plaintiffs being left with "nothing but hope [which] was clearly insufficient to make out a case against defendant;"[7] and (ii) a citizen suit under Section 505 "may go forward if the citizen-plaintiff fairly alleges a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act." Because "[a]t the time plaintiffs brought suit . . . the defendant had ceased operating under [its] permit . . . [and] there was no reasonable likelihood that defendant's alleged infractions would continue," the Court of Appeals affirmed the District Court's dismissal of the action.[8] Plaintiffs subsequently petitioned this Court for a writ of *certiorari*.

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[6] *See* App. at 35. The sole exception was plaintiffs' trespass claim, which on plaintiffs' motion was dismissed with prejudice after plaintiffs admitted they could not prove any trespass.

[7] December 18, 1986 Opinion of the Court of Appeals, *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, 807 F.2d 1089, 1091 (1st Cir. 1986); App. at 3.

[8] December 18, 1986 Opinion of the Court of Appeals, 807 F.2d at 1094; App. at 9-10. The Court of Appeals also held that there was no abuse of discretion by the District Court when it denied plaintiffs' August 1985 motion to amend based on the spill incidents. 807 F.2d at 1094; App. at 10-11.

REASONS FOR DENYING THE PETITION

A. Plaintiffs Should Not Be Entitled to Relitigate in This Court Their View of the Factual Circumstances of The Case, Where That View Was Repeatedly Rejected by the Courts Below as Wholly Unsupported.

Plaintiffs base their Petition for *Certiorari* entirely on supposed errors of fact made by the courts below, as to both the citizen suit issue and the common law claims. These assertions, even if colorable (and they are not), do not suffice to support a Petition for *Certiorari.*

1. *The Citizen Suit Claim.*

The body of plaintiffs' Petition does not appear to challenge the legal conclusion of the courts below that no action will lie under Section 505 unless it is one to abate ongoing violations. As plaintiffs frame the citizen-suit issue in their Petition for *Certiorari,* the "circuit court ignored the fact there were ongoing violations" of CIBA-GEIGY's NPDES permit.[9]

It is settled practice that this Court does "not grant a [writ of] *certiorari* to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925).

Moreover, it is clear that the courts below correctly found that plaintiffs did not—and could not—allege an ongoing violation of CIBA-GEIGY's NPDES permit at the time the action was commenced (or thereafter). The plaintiffs' Complaint, Amended Complaint, and Second Amended Complaint each failed to allege that CIBA-GEIGY was "in violation" of an effluent standard or limitation in a permit "in effect."

Plaintiffs' Petition for *Certiorari,* however, cites the existence of violations "after the petitioners had filed the requisite statutory notice," though not as of the time

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[9] Petition for *Certiorari* at 7.

the action was commenced.[10] This argument tracks plaintiffs' August 1985 motion to amend based on purported "ongoing violations," which was rejected by the District Court. The District Court held that "the fourth attempt by the plaintiffs to inject the (phantom) ongoing violation issue into the case . . . comes too late and clearly bears the hallmark of yet another exercise in abject futility." App. at 31. The Court of Appeals agreed. 807 F.2d at 1094; App. at 10-11.

The plaintiffs now attempt to argue that the courts below should have presumed that violations of CIBA-GEIGY's NPDES permit were ongoing and that plaintiffs would be able to prove a likelihood of continued violations.[11] This position has no support in law, and is contrary to the facts as found by the courts below.

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[10] The purported "violation" referred to in the Petition for *Certiorari*, at 4, was a minor "spill" of pretreated wastewater being transported between the CIBA-GEIGY plant and the Cranston municipal wastewater works. The spill did not contain any reportable quantity of any substance; was not a violation of any NPDES permit which was in effect; and is separately regulated under Section 311 of the Clean Water Act governing spills (and therefore not properly the subject of a citizen suit under Section 505). In any event, it occured prior to the commencement of this action with no likelihood of recurrence. *See* December 18, 1986 Opinion of the Court of Appeals, 807 F.2d at 1094; App. at 10-11.

[11] Plaintiffs also state, somewhat plaintively, that "[n]ot doing so, both courts should have allowed petitioners leave to amend the complaint so as to allow them to conform to the court's new interpretations of the statute." Petition for *Certiorari* at 8. Though the court's interpretation merely tracked the plain language of the statute, the District Court did allow plaintiffs leave to amend following its May 17, 1984 ruling. App. at 17. Plaintiffs were unable, consistent with the District Court's instruction that any amendment "comply fully with the mandate of Fed. R. Civ. P. 11," *Id.*, to amend the Complaint to allege ongoing violations. The District Court again dismissed the Clean Water Act count on September 10, 1984, and denied a motion for reconsideration on June 7, 1985. As the Court of Appeals found, there was no abuse

2. *The State Common Law Claims.*

As regards the granting of summary judgment on the state common law issues, plaintiffs base the entirety of their argument in this Court on an alleged misreading of the evidence by the District Court and the Court of Appeals. As the District Court noted, on motion for summary judgment, CIBA-GEIGY presented "a pot-pourri of materials" from the "voluminous record" in the case negativing plaintiffs' contentions of proximate and actual causation; in response, plaintiffs "offered nothing but the merest of vellieties: they eschew any present tender of proof, but mouth empty assurances that they will (somehow) prove the 'but for' connection at a trial. Such generalized assurances are manifestly insufficient to blunt the blade of a properly-honed Rule 56 axe." [12] Plaintiffs simply did not come forward with any showing sufficient to resist CIBA-GEIGY's properly-supported motion for summary judgment.[13] The District Court clearly evaluated plaintiffs' claims in an appropriate light.[14] So did the Court of Appeals.

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of discretion when the District Court rejected yet another attempt to introduce the issue in August of 1985. 807 F.2d at 1094; App. at 11.

[12] September 19, 1985 Memorandum Decision of the District Court, App. at 26. At trial, plaintiffs admitted that they were unable to offer any additional evidence, beyond their assertions in opposition to summary judgment, bearing on the causal connection between CIBA-GEIGY's discharges and the lack of dredging of Pawtuxet Cove. See the District Court's order, App. 35.

[13] *See Celotex Corp. v. Catrett*, —— U.S. ——, 106 S.Ct. 2548 (1986). CIBA-GEIGY submitted with its motion a statement of facts drawn from plaintiffs' own allegations in their various pleadings, plaintiffs' sworn deposition testimony, plaintiffs' sworn answers to interrogatories, plaintiffs' documents provided in discovery, and certified copies of official records of the United States Army Corps of Engineers (the agency in charge of dredging projects).

[14] "[T]he plaintiffs have failed to offer a fact-based predicate, *sufficient, even when examined in the light most favorable to the*

Plaintiffs' Petition for *Certiorari*—as to both the citizen suit claim and the state common law issues—presents primarily "a question of fact, which does not merit Court review." *National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing writ of *certiorari* as improvidently granted). This Court consistently has been unwilling to disturb such lower court determinations, particularly where, as here, the District Court and the Court of Appeals reach identical conclusions.[15]

B. Citizen-plaintiffs May Not Maintain an Action Under Section 505 of the Clean Water Act Against a Former Industrial Discharger Where, As Here, the Former Discharger Is Not and Cannot Be Alleged To Be "in violation" of an Effluent Standard or Limitation Contained in a Permit That Is "in effect" Under the Clean Water Act.

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, permits an action against any person "who is alleged to be *in violation* of" an effluent standard or limitation, which is defined to include a permit "which *is in effect*" under the Act. Section 505(a)(1), (f)(6) (emphasis added). Jurisdiction is conferred on the district courts to enforce the effluent limitations in the permit and as ancillary relief to apply "appropriate" civil penalties. Section 505(a).

No allegation of continuing or recurring violations was or could be made in this case; no permit for the discharge

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plaintiffs, to support the conclusion that the Cove would have been dredged but for [CIBA-GEIGY's] shortcomings. In the absence of any genuine issue of material fact on the issue, the defendant is plainly entitled to *brevis* disposition as a matter of law." September 19, 1985 Memorandum Decision of the District Court, App. at 26 (emphasis supplied).

[15] *See, e.g., United States v. Doe*, 465 U.S. 605, 613-14 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

of process wastewater was in effect, and no possibility of continuing or indeed any future violation existed. The Court of Appeals for the First Circuit undertook an extensive examination of the language, history, and purpose of the citizen suit provision of the Clean Water Act, and correctly concluded that it did not reach the conduct of CIBA-GEIGY in the case at hand.

Plaintiffs urge that *certiorari* should be granted in this case because the decision below of the Court of Appeals for the First Circuit conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), *cert. granted*, —— U.S. ——, 107, S.Ct. 872 (1987), pending before this Court as No. 86-473.[16] This Court is already addressing the issue of statutory construction presented here in the *Gwaltney* case, and need not review this case to resolve the purely legal question.

Moreover, the defendant in *Gwaltney* and CIBA-GEIGY in this case are in fundamentally different factual circumstances.[17] In *Gwaltney*, though the alleged violations had ceased at the time the action was commenced, the defendant continued to discharge process wastewater pursuant to an NPDES permit which was in effect. In contrast, in this case: (i) no permit was "in effect" at time of suit; (ii) no future violations of a

---

[16] The decision below in this case is consistent with *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985). In *Hamker*, no NPDES permit ever existed and the alleged "violation" was a one-time incident. In *Pawtuxet Cove*, all process wastewater discharges pursuant to the NPDES permit had ceased prior to suit, and there was no ongoing pollution to be abated.

[17] In a case more closely analogous to the present one, *i.e.*, where the discharger "has ceased or will shortly cease the operations at issue here and will abandon its relevant discharge permits," the Court of Appeals for the Fourth Circuit dismissed the appeal of a citizen suit under Section 505 as moot. *Chesapeake Bay Foundation v. American Recovery Co.*, 769 F.2d 207, 209 (4th Cir. 1985).

permit were possible because process wastewater discharges had ceased, and (iii) plaintiffs did not—and repeatedly remained unable to—allege any continuing violation.

The Fourth Circuit in *Gwaltney* did not have occasion to examine the combined effect of Section 505(a)(1) and Section 505(f)(6), since Gwaltney's permit was still "in effect" although not being violated at the time suit was commenced. This Court's decision in *Gwaltney* will necessarily be limited to construction of the statutory term "in violation" in Section 505(a)(1) and will not alter the decision in this case where no permit is "in effect" within the meaning of Section 505(f)(6). Thus, even if this Court should decide in *Gwaltney* that civil penalties are available under Section 505 for purely past violations by a discharger who continues to operate under an NPDES permit, that decision would not necessarily alter the outcome of this case against a former discharger. Regardless of the outcome in *Gwaltney*, there is no need for the Court to review the decision in this case.

CONCLUSION

The Petition for *Certiorari* should be denied.

Respectfully submitted,

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April 20, 1987

Supreme Court, U.S.
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No. 86-1562

In The
Supreme Court of the United States
October Term, 1986

PAWTUXET COVE MARINA, INC., *et al.*,
Petitioners,

v.

CIBA-GEIGY CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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June 11, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

PARTIES TO THE PROCEEDING

Pawtuxet Cove Marina, Inc. has no parent companies, subsidiaries or affiliates.

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STATUTES:

Clean Water Act of 1977 (33 U.S.C. § 1251, *et seq.* 33 U.S.C. § 1365 3

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In The
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY MEMORANDUM

STATEMENT OF THE CASE

Petitioners' original Statement of the Case is incorporated herein by reference. Petitioners emphasize that the chemical company emitted illegal discharges after this litigation commenced and continued to operate under an Environmental Protection Agency permit through August 29, 1984.

ARGUMENT

Respondent's memorandum indicates some facts which are both misleading and inaccurate. The purpose of this reply memorandum is to clarify the facts so that this Honorable Court can accurately review this case. The particulars must be corrected so this Court can consider this petition on its merits and properly frame a decision should the petition be granted and summary action taken.

This Court must be apprised of the correct facts in order to make an informed judgment granting the petition for certiorari or ordering a summary disposition. The confusion of facts should not dissuade this Court from granting certiorari here where the circuit courts continue to be in conflict. Certiorari has been granted to consider the same issue in another case. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (C.A. 4, 1986), certiorari granted, — U.S. —, 93 L.Ed. 2d 827, 107 S.Ct. 872 (1987).

A. THE CHEMICAL COMPANY CONTINUED TO DISCHARGE UNDER THE SAME FEDERAL WATER POLLUTION CONTROL ACT PERMIT BEYOND THE COMMENCEMENT OF THIS LITIGATION.

Respondent's memorandum at page two states that the chemical company's permit "expired by its own terms in July of 1983". The chemical company's permit was due to expire, however it was renewed and hence continued in effect at least until August 29, 1985. In June, 1986 the chemical company admitted that its permit was still in effect (Brief of Appellee at 10, *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, 807 F.2d 1087 (C.A. 1, 1986).

Any implication that the chemical company stopped its emissions under its Clean Water Act, 33 U.S.C. section 1251, *et seq.* permit is untrue.

When the permit was renewed, it contained new conditions. After years of delay, the chemical company was required to "tie-in" to the city of Cranston's sewer system. The renewed permit, with the same Environmental Protection Agency number, allowed the chemical company to continue to emit cooling water, thereby modifying the temperature of the Pawtuxet River. Briefly stated, the permit was the same—only more strict.

The chemical company makes the circumstances more confusing in the first footnote of its memorandum. To clarify, the chemical company, not the city, held the permit. The chemical company's permit is very much an issue in this case: This same permit was violated (Petition at page 4) after this litigation commenced. Moreover, the discharges were not "relatively small". For example, the emission of September 7, 1983 included 50,000 gallons of wastewater (Petition at page 4).

The chemical company continues to juxtapose facts by claiming that it no longer discharged "process" wastewater. (Respondent's Memorandum at pages 2, 3, and 10). In truth, discharges into the Pawtuxet River were released. The "non-process" discharges were permitted, and process wastewater discharges were prohibited by the renewed Clean Water Act permit.

Surprisingly, the chemical company now introduces a new justification for its violation of September 7, 1983. Respondent's memorandum, page 7, footnote 10. No explanation was provided in the courts below. The chemical

company denied that this spill occurred even during the oral arguments before the Circuit Court of Appeals. Unable to change the past, the chemical company now attempts to justify an admitted violation of its permit. There is no justification for illegal pollution.

In sum, the crux of the petition should not be obscured. Throughout the course of this litigation, the chemical company held a discharge permit. It violated the permit before, during and after the litigation commenced.

B. THE CHEMICAL COMPANY CONFUSES THE TRAVEL OF THIS CASE AT THE TRIAL COURT LEVEL.

The chemical company accuses your petitioners of hampering the trial court. Petitioners never made "assurances" that the common law counts were founded on independent bases (Respondent's Memorandum at page 4). It is untrue that "the issue . . . had been resolved." (Respondent's Memorandum at page 4). The trial court's decision (Appendix pp. 22-32) does not indicate whether the common law counts survive on their own.

To rectify what issues could be tried, petitioners asked the trial court whether the nuisance, negligence, and strict liability counts were adjudged or limited by the summary judgment decision. These requests were made orally at pretrial conferences and by a formal Motion to Clarify. The trial court refused to consider these requests. At trial, your petitioners recognized that further proceedings might be wasteful, and again sought resolution:

> After a day-and-a-half of trial, this noontime Mr. Lanphear, to his credit, has informed the Court and

> opposing Counsel that his case, as he sees it, is dependent on the lack of dredging and on the causal connection as the Plaintiffs view it between the Defendant's conduct and the lack of dredging.
>
> (District Court Judge Selya, transcript of proceedings of United States District Court For The District Of Rhode Island, Tuesday, February 14, 1986.)

Petitioners agreed to dismiss the claim of trespass but never "admitted they could not prove any trespass." (Respondent's memorandum, page 5, footnote 6). Rather, the trial court suggested to petitioners that if a trespass was proven, petitioners would only be awarded nominal damages. To save the trial court's valuable time, petitioners opted to avoid a lengthy, complicated trial which would result in mere nominal damages.

The chemical company further infers that plaintiffs attempted to delay the trial court proceedings.

> [A]t trial, plaintiffs admitted that they were unable to offer any additional evidence, . . . bearing on the causal connection between CIBA-GEIGY's discharges and the lack of dredging of Pawtuxet Cove. Respondent's memorandum, p. 8, footnote 12.

Neither petitioners nor their attorneys made such statements. Rather, they had proof and continue to have proof of a causal connection between Ciba-Geigy's discharges and the lack of dredging of the Pawtuxet Cove. The trial court would not allow petitioners to introduce this proof into evidence even after repeated offers of proof. Therefore, petitioners again asked for clarification of the summary judgment order. Now, petitioners request that the common law counts be restored so that they may introduce this proof.

C. THE CIRCUIT COURT OF APPEALS SHOULD NOT HAVE DECIDED ISSUES OF FACT.

Not only does the chemical company use erroneous facts, it buttresses its arguments with incorrect findings used by the First Circuit Court of Appeals.

The chemical company relies on the holding of the Court of Appeals that "defendant had ceased operating under this permit" and "there was no reasonable likelihood that the defendant's alleged infractions would continue" *Pawtuxet Cove Marina, Inc. v. CIBA-GEIGY Corp.*, 807 F.2d 1089, 1094 (C.A. 1, 1986); App. at 10; Respondent's Memorandum at 5. The circuit's decision is manifestly incorrect. The chemical company continued to operate under the permit and future violations occurred. There are no findings of fact by the trial court for the circuit to make these conclusions.

The citizens suit claim under the Clean Water Act was rejected by the trial court in response to a motion to dismiss. In considering such a motion, courts must consider facts in a light most favorable to the non-moving party (petition, p. 8). It was inappropriate for the Court of Appeals to make its own findings of fact here. See *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U.S. 606, 608, 80 L.Ed. 879, 881, 56 S.Ct. 604, 605 (1936). Hence, the recital of facts by the First Circuit Court of Appeals should not be considered binding or accurate, but mere assumptions. These assumptions were not well-founded and show that the Circuit Court's decision was misplaced and should be ignored. Petitioners urge this Honorable Court to review the trial court record as it stands and overturn the dismissal and summary judgment orders on conventional legal standards.

CONCLUSION

Petitioner submits this reply memorandum in order to correct a number of crucial facts which have been inaccurately presented by the respondent. Petitioners request that the Petition for Certiorari be granted.

Respectfully submitted,

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